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Nº. 1

Supreme Court, U.S.
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In The
Supreme Court of the United States

STEPHEN A. MANN,
Petitioner,

v.

MICHAEL HELMIG,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI
with Appendix

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October, 2008

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QUESTIONS PRESENTED

1. Can a municipality delegate its decision making authority to a third-party, and then escape liability in a 42 U.S.C. § 1983 action for redress of constitutional injuries, by claiming that the injury was not the result of the municipality's policy?

2. Can a municipality avoid liability for a constitutional injury when it condones and endorses the illegal conduct of the agent that committed the constitutional violation?

LIST OF PARTIES

The Petitioner, Stephen Mann, is an individual citizen of the United States of America. Respondents are Boone County, Kentucky,[1] and the Boone County Sheriff Michael Helmig.

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[1] Suits brought against a ranking official in his official capacity is a suit against the entity itself. *See Brandon v. Holt*, 469 U.S. 464 (1985).

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The opinion of the United States Court of Appeals for the Sixth Circuit is not reported, but is reproduced in Appendix A. The opinion and order of the district court is unreported, but is reproduced in Appendices B and C.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on July 16, 2008. *See* Appendix A. The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was proper under 28 U.S.C. § 1291, and jurisdiction in the district court was proper under 42 U.S.C. § 1983; 28 U.S.C. § 1331; and 28 U.S.C. § 1343.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amend. II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

United States Constitution, amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution, amend. XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42. United States Code, Section 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by

the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

1. Agents of the Boone County Sheriff's Office unlawfully, and without a search warrant, seized several legally owned firearms from the home of Petitioner Stephen Mann. Mann submits that this unlawful seizure was made by a county deputy under the direction of a commonwealth attorney, and as such, implicated official county policy and imposed municipal liability pursuant to the standards established by this Court in *Monell v. Department of Social Services,* 436 U.S. 658 (1978) and *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986)

Stephen Mann is a decorated[2] combat veteran. He proudly served as a Marine in Vietnam where he was left permanently disabled as a result of gunshot wounds he suffered during a firefight with the enemy. He also served in the United States Army, and then as a civilian contract procurement agent for the Department of Defense.

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[2] Stephen Mann has been awarded the Purple Heart; Vietnam Campaign Medal; Vietnam Service Medal; National Defense Service Medal; Combat Action Ribbon; Presidential Unit Citation; Korea Defense Service Medal; and, the Army Commendation Medal.

After a lifetime dedicated to serving his country, Mann hoped to live undisturbed at his country home in Boone County, Kentucky. Sadly, Mann's dream of peace and solitude started to crumble in 1999 when his estranged sister, who is also a convicted federal felon, filed a Domestic Violence Order ("DVO") against him. Mann asserted that the claims made by his sister were false and retaliatory. Nevertheless, the DVO was granted and continued in effect until December of 2005.

In May of 2005, Mann was target shooting in his backyard; a perfectly legal act where Mann lived. In response to a call of shots being fired, Deputy Combs of the Boone County Sheriff's Office arrived at Mann's home. Mann acknowledged that he had been target shooting on his property and showed Deputy Combs the firearms he had been firing. Since no law had been violated, Deputy Combs left Mann's house. This first encounter was cordial and polite.

Mann returned to target shooting. A short time later, Deputy Combs re-appeared on Mann's property. Mann observed Deputy Combs standing near his porch in a crouched shooting stance with his hand on or near his sidearm. Deputy Combs ordered

Mann to drop his gun. Alarmed by Deputy Combs' hostile actions, Mann carefully complied with the order to unload and put his gun down.

Deputy Combs then questioned Mann about the DVO that was issued against him. Mann went inside his house to get a copy of the DVO for the deputy. Deputy Combs followed him inside. Mann gave a copy of the DVO to Deputy Combs and explained that he was not prohibited from possessing firearms because his sister was not an "intimate partner."[3] While Deputy Combs appeared unsure on how to proceed, he refused to accept Mann's explanation. Instead, Deputy Combs asked Mann if he could take his guns. Mann protested and stated, "I prefer you not take my guns."

Deputy Combs then used Mann's kitchen telephone to try to contact the County Attorney to determine how he should proceed. Not able to contact the County Attorney, Deputy Combs then contacted Assistant Commonwealth Attorney Jason

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[3] A DVO only prohibits a person from possessing firearms if the subject of the order is an "intimate partner." *See* 18 U.S.C. § 922. The DVO filed by Mann's estranged sister did not prohibit him from owning or possessing firearms.

Hiltz for advice. Hiltz erroneously advised Deputy Combs that since Mann was the subject of a DVO he could not lawfully possess firearms. About this time, a second deputy, Deputy Duncan, also appeared at Mann's home.

After completing his telephone conversation with the Assistant Commonwealth Attorney, Deputy Combs advised Mann that he was going to confiscate all of Mann's firearms. The two deputies then went through Mann's home and took all of his guns and ammunition. This was all done in the absence of a search warrant.

Mann immediately hired an attorney to secure the return of his property. When the unlawfully seized firearms were not returned to Mann he filed a lawsuit for a violation of his constitutional rights and replevin of his property.

2. On August 2, 2005, Petitioner filed a lawsuit in the Eastern District of Kentucky seeking relief under 42 U.S.C. § 1983. Petitioner and Respondent both filed motions for summary judgment pursuant to Fed. R. Civ. P. 56(c).

In his defense, the Sheriff perpetuated an absurd story concocted by Deputy Combs. The Sheriff claimed that his deputies had not actually confiscated Mann's firearms. Rather, he claimed that Mann had voluntarily surrendered his firearms to the deputies for safekeeping. In response to this complete fabrication, Mann took a polygraph examination which confirmed that he was being truthful about protesting the seizure of his guns and that he never voluntarily surrendered his guns to the deputies. Further, this ludicrous claim of voluntary surrender by the Sheriff and his deputy was flatly rejected by the district court. The district court stated:

Well, I think they were taken against his consent, and if the policy is there, after I read these cases, if I felt – seems to be lacking. They did take his property. It was illegal, although not intentionally illegally.

On March 30, 2007, the District Court granted Respondent's motion for summary judgment and dismissed Mann's complaint. Mann's motion for summary judgment was denied.

3. On April 26, 2007, Petitioner filed his Notice of Appeal. The Sixth Circuit's decision was entered on July 16, 2008.

REASONS FOR ALLOWANCE OF THE WRIT

Whether a County can avoid liability in 42 U.S.C. § 1983 actions by delegating policy making decisions to a third-party is a critical issue that needs to be addressed by this Court. The existence of constitutional rights is meaningless if citizens lack a legal method to redress wrongs committed against them by governmental entities. With the creation of the Civil Rights Acts of 1871, or what is now codified as 42 U.S.C. § 1983, Congress established a means by which wronged citizens could seek redress against the offending parties. In *Monell v. Department of Social Services,* 436 U.S. 658 (1978) this Court justly recognized that municipalities[4] could not escape liability for constitutional violations for which they were responsible. This Court extended liability for 42 U.S.C. § 1983 violations to municipalities. But that expansion was not without its limits. "It is when execution of a government's policy or custom, whether made by its lawmakers or by those whose

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[4] A "municipality" for purposes of §1983 litigation includes not only city government but also similar government entities. *See Pembaur v. City of Cincinnati,* 41 U.S. 469, 483 (1986)(counties are subject to suit under § 1983). "Municipality" is a generic term for local government entities.

edicts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell* at 694.

In *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), this Court expanded on what can be considered a policy of the municipality sufficient to establish liability pursuant to § 1983. *Pembaur* made it clear that the policy requirement established in *Monell* was not just about formal written rules, but was also about customs and unwritten plans of action. *Pembaur* at 473-74. After all, it would be ridiculous to require an injured citizen to prove that a municipality had a formal written policy promoting the violation of constitutional rights before he or she would have a remedy against the municipality. Rather, the policy requirement is meant to distinguish those injuries for which "the government as an entity is responsible under § 1983." *Monell* at 694. "*Monell* is a case about responsibility." *Pembaur* at 478.

In the case at bar, Boone County is responsible for the constitutional injuries suffered by Mann. Like in *Pembaur*, Deputy Combs was in a position where he was unsure how to proceed. Like the deputies in

Pembaur, Deputy Combs contacted an assistant prosecuting attorney to determine how to proceed. In this case, the assistant commonwealth attorney erroneously advised the deputy that Mann could not legally possess firearms. As a direct result of that advice, Deputy Combs illegally confiscated all of Mann's firearms. Further, it was established that the Boone County Sheriff had a custom for following the advice of a Commonwealth Attorney when a deputy was in a position where he was unsure how to proceed. In this case, like in *Pembaur*, the municipality should not be permitted to evade liability for this constitutional violation.

This is not a case where the deputy was out on some type of lark when he unlawfully confiscated Mann's firearms. He was unsure how to proceed so he contacted the Commonwealth Attorney for direction. That direction was given and the deputy followed it. The Sheriff even agreed with the course of action taken by the deputy. The Sheriff expected that if his deputies sought advice from the Commonwealth Attorney, they were to follow that advice. Boone County cannot now disavow liability for a wrong that it is responsible for creating.

If the decision of the Sixth Circuit is permitted to stand, the ability of citizens to seek redress for constitutional injuries suffered at the hands of government agents will be greatly diminished. Municipalities could simply delegate their decision making authority to a third party and become immune from liability. When a constitutional violation does take place, the municipality could simply wash its hands of the wrongdoing by pointing out that it was not responsible for the offending decision. This Court never intended such a result when it established the policy requirement in *Monell*. This Court should accept jurisdiction of this very important case to address the critical issues that are at stake. Otherwise, Mann, and the many more that will likely follow, will have no recourse for blatant violations of their constitutional rights at the hands of governmental entities.

I. REVIEW IS WARRANTED BECAUSE THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

A. Summary Judgment Was Not Proper Because Mann Established a *Prima Facie* Case Pursuant to 42 U.S.C. § 1983.

In the aftermath of the Civil War, Congress recognized the critical importance that the Constitution guarantee the personal liberties of all citizens. With the creation of the Civil Rights Acts of 1871, Congress provided broad remedies to all persons deprived of federally protected rights under the color of state law.

42 U.S.C. § 1983, originally passed as the Ku Klux Klan Act of 1871, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by

> the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

To state a claim under 42 U.S.C. § 1983, a plaintiff must set forth facts which establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). Further, this Court has recognized that 42 U.S.C. § 1983 must be "liberally and beneficently construed." *Dennis v. Higgins*, 498 U.S. 439, 443 (1991).

1. Mann Was Deprived of a Right Secured by the Constitution.

While the district court found that it was not necessary to rule on whether Mann's constitutional rights were violated, there can be no doubt his rights were in fact violated. Whether couched in terms of a Second, Fourth, Fifth, or Fourteenth Amendment violation, Mann's complaint should not have been dismissed. The district court correctly concluded that Mann's firearms were seized illegally. Thus, Mann had a legitimate cause of action for a Second

Amendment violation, *See District of Columbia v. Heller*, ___ U.S. ___,128 S.Ct. 2783 (2008)(Second Amendment protects an individual's right to keep and bear firearms); a Fourth Amendment violation, *See Marron v. United States*, 275 U.S. 192, 196 (1927)(a warrantless seizure of personal property is *per se* unreasonable within the meaning of the Fourth Amendment); a Fifth Amendment violation (takings clause prohibits the deprivation of property without due process of law); and a Fourteenth Amendment violation. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)(the root of the due process clause is that an individual shall be given an opportunity for a hearing before he or she is deprived of a protected interest).

2. Deputy Combs Acted Under Color of State Law.

Further, there was no dispute that Deputy Combs of the Boone County Sheriff's Office was acting under the color of state law when he illegally seized Mann's firearms. Therefore, Mann has satisfied his burden in establishing a 42 U.S.C. § 1983 violation. The issue then becomes whether Mann has a cause of action against Sheriff Helmig and Boone County for a violation of his constitutional rights.

B. Mann Satisfied the Policy Requirement of *Monell* and Boone County is Liable For The Constitutional Injuries Suffered by Mann.

This Court's landmark decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) enabled harmed plaintiffs to seek redress against municipalities for violations of constitutional rights. In *Monell*, this Court held that political subdivisions of a state are "persons" for purposes of liability pursuant to 42 U.S.C. § 1983. This Court recognized that Congress intended broad construction of the statute and that municipalities as well as natural persons could create the harms Congress designed the statute to remedy. *Id.* at 685-86. However, since the time *Monell* was decided, courts have struggled to define the limits of government liability under 42 U.S.C. § 1983.

In *Monell*, this Court rejected the application of the doctrine of *respondeat superior* as a precedent for the imposition of municipal liability pursuant to § 1983. Instead, this Court held that municipal liability depends on whether the plaintiff's constitutional rights have been violated as a result of

a "policy" or "custom" attributable to the municipality. *Id.* at 691. "It is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

This Court expanded upon the *Monell* policy requirement in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). *Pembaur* raised the question of whether law enforcement officers were implementing official policy at the time the constitutional injury occurred. In *Pembaur*, deputy sheriffs and city police officers arrived at a physician's clinic to serve capiases on two employees who failed to appear before a grand jury. When the physician refused to grant admittance to the deputies, they were unsure how to proceed. They then contacted the prosecuting attorney for direction. The deputies were advised "to go in and get" the witnesses. The deputies then forcibly entered the clinic. Subsequently, the physician filed a § 1983 action against the county and city claiming fourth and fourteenth amendment violations. *Id.* at 472-473.

In *Pembaur*, the district court dismissed the claims against the county and city, concluding that the officers were not acting pursuant to the type of official policy established in *Monell*. The Sixth Circuit reversed the dismissal of the complaint against the city, but affirmed the dismissal against the county. Although it found the sheriff and prosecutor to be officials authorized to establish official policy, the court concluded that evidence of one occasion in which officials decided to force an entry in violation of the fourth amendment was insufficient to establish an official policy. *Id.* at 475.

This Court reversed, and even though it involved a single instance, found that the "county prosecutor was acting as a final decisionmaker for the county." This was sufficient to impose municipal liability pursuant to § 1983. The same rationale applies to this case. In this case, like the deputies in *Pembaur*, Deputy Combs was unsure how to proceed. He contacted the commonwealth attorney for directions. An assistant commonwealth attorney advised Deputy Combs, albeit incorrectly, that because of the DVO Mann could not legally possess firearms. Like the prosecuting attorney in *Pembaur*, the commonwealth attorney acted as a final decision

maker for the Boone County Sheriff's Office. He became a *de facto* policy maker for Boone County. This decision implicated official county policy, and imposed municipal liability for purposes of § 1983.

Additionally, Boone County Sheriff Helmig admitted that it was the policy, or custom, of his office to follow the advice of the County or Commonwealth Attorney. At his deposition, the following colloquy took place with Sheriff Helmig:

> Q. Okay. If the deputy is in a situation where he's contacting the County Attorney or the Commonwealth Attorney to determine if he's permitted to take certain action under this protection order –
>
> A. Uh-huh.
>
> Q. -- and the attorney tells him to take certain action, would you expect them to follow the advice of the attorney.
>
> A. I think in general when we're seeking legal advice from the County Attorney or the Commonwealth Attorney, we follow that advice.

In *Pembaur*, this Court explained that the official policy of a county is not only formal written

rules, but also unwritten plans of action. *Id.* at 473-74. It is clear in this case that Boone County had a policy or custom to follow the advice that is given to them by the commonwealth attorney. The commonwealth attorney advised Deputy Combs how to proceed. Deputy Combs acted in compliance with that advice, just as he was expected to do by Sheriff Helmig. The County cannot now claim it is not liable because the decision to unlawfully confiscate Mann's property did not involve official county decision making.

In the district court below, the judge noted that Mann had not shown, "as a matter of law, that this single isolated incident was part of any pattern of constitutional conduct by Boone County . . ." This Court rejected that same argument in *Pembaur*. *Pembaur* recognized that under the appropriate circumstances, "municipal liability may be imposed for a single decision by municipal policymakers . . ." *Id.* at 480. Moreover, a course of action established by appropriate decisionmakers can constitute an official policy even if it is tailored for a specific situation and not intended to control decisions in subsequent circumstances. *Id.* at 481.

The requirement that a municipality's wrongful actions be a "policy" is not meant to distinguish isolated incidents from general rules promulgated by city officials. It is meant to distinguish those injuries for which the government as an entity is responsible under § 1983 from those injuries for which a government should not be held accountable. *Pembaur* at 478.

The Sixth Circuit's decision in this case even conflicts with its own prior decisions. In *Monistere v. City of Memphis*, 115 Fed. Appx. 845 (6th Cir. 2004), a Memphis police Lieutenant investigated a theft complaint made by a citizen against two police officers. The Lieutenant assigned two internal affairs Sergeants, including a Sergeant Embry to investigate the matter. During the investigation, Sergeant Embry ordered the two police officers who were suspected of the theft to remove their clothing for inspections. Afterwards, the two suspect officers brought a § 1983 action against the municipality. *Id.* at 847.

In response, the City of Memphis claimed that it was not liable because it never maintained any custom or policy that resulted in the injuries that

were sustained by the two police officers. The City claimed that Sergeant Embry's directives to the two police officers constituted a single, isolated occurrence – and nothing more. In that case, the Sixth Circuit properly rejected that argument. Instead, the Sixth Circuit found that the unwritten custom of the City was to allow the lead investigator to make decisions as to how to conduct the investigations. Based on that fact, the Sixth Circuit held that it was reasonable for a jury to conclude that the City had a practice of granting its lead investigator the complete discretion on how to conduct their own investigations. "Accordingly, it is this practice – and not Embry's specific decision to order that strip search – that represented a custom 'so widespread as to have the force of law.'" *Id.* at 851-853.

If that same standard was properly applied to this case, the Sixth Circuit should have decided differently. The Sheriff had a custom of delegating decision making to the Commonwealth Attorney. When the Sheriff or his deputies contacted the County or Commonwealth Attorney for advice . . . they followed that advice. That is just what it did in this particular case. As a result of that decision,

Mann suffered a constitutional injury. As such, § 1983 liability attaches to Boone County. The Sheriff cannot delegate his decision making authority to someone else, and then claim the County bears no responsibility for the injuries that follow.

In the district court below, the judge concluded that the assistant commonwealth attorney was simply giving advice to Deputy Combs. First, even if that was the case, it would not exonerate the Sheriff or the County. The Sheriff's policy was to follow whatever advice was given by Commonwealth Attorney, so his advice was no different than a directive. Second, once the assistant commonwealth attorney advised Deputy Combs that Mann could not lawfully possess firearms, it would be disingenuous to suggest that Deputy Combs, a sworn law enforcement officer, would have done anything other than confiscate Mann's firearms. After all, the Sheriff expected that his deputies would follow the advice of the Commonwealth Attorney.

C. Liability Attaches to Boone County by Virtue of the Fact That Sheriff Helmig Condoned the Unlawful Confiscation of Mann's Firearms.

Even if Mann did not establish liability pursuant to *Monell*, Boone County would still not be able to escape liability by virtue of the fact that Sheriff Helmig condoned the illegal conduct of Deputy Combs, and expressed deliberate indifference to his unlawful conduct. *See e.g. Hays v. Jefferson*, 668 F.2d 869, 874 (6th Cir. 1982). Sheriff Helmig accepted, supported, and perpetuated the preposterous claim of Deputy Combs that Mann had voluntarily surrendered his firearms. Sheriff Helmig conducted no internal investigation to determine how it was that one of his deputies illegally removed firearms from a citizen's home. Sheriff Helmig took no disciplinary action against Deputy Combs for committing this illegal act. Even when Sheriff Helmig learned that Mann had verified his version of the facts through a polygraph examination, Sheriff Helmig still took no action. Instead, he continued to accept the ridiculous claim of his deputy – a claim that was summarily rejected by the district court.

It is clear that Sheriff Helmig accepts and condones dishonesty on the part of his deputies. This ludicrous claim that Mann voluntarily turned his guns over for safekeeping was not the first time Sheriff Helmig blindly accepted lies and misrepresentations made by his deputies. Another deputy, Deputy Markesberry, deceitfully held himself out to be a former Navy SEAL. Despite the fact that one of his deputies fraudulently claimed military honors that he never earned, Sheriff Helmig never took any disciplinary action against Deputy Markesberry. Even more disturbing, Sheriff Helmig has continually claimed there is no evidence that Deputy Markesberry was not a Navy SEAL. The Sheriff holds to this preposterous claim even though the Naval Special Warfare Center has verified in writing that Deputy Markesberry was never a Navy SEAL. If that was not enough, a sworn affidavit from Larry Bailey (retired Captain from the U.S. Navy and former Commanding Officer of the Naval Special Warfare Center) was submitted in the courts below. Bailey had supervised Markesberry when he attempted to complete SEAL training. Bailey personally made the decision to drop him from SEAL training for performance reasons. Bailey attested that Markesberry never became a SEAL and that it

was deceitful for him to hold himself out as a former SEAL. Even after the sworn affidavit from Markesberry's former Commanding Officer was submitted, Sheriff Helmig still absurdly claimed that there was no evidence that his Deputy Markesberry was not a former SEAL. This certainly shows that Sheriff Helmig will accept and condone any and all deceitful and unlawful conduct on the part of his deputies.

Because Sheriff Helmig and Boone County fully accepted and endorsed the illegal conduct of Deputy Combs, it cannot now evade liability for an action brought pursuant to 42 U.S.C. § 1983.

II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT ON WHEN AN OFFICIAL BECOMES A POLICYMAKER FOR A MUNICIPALITY.

As already discussed, the Sixth Circuit's decision in this case conflicts with this Court's jurisprudence and its own established precedence. Its decision also conflicts with other circuits. For instance, in *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 45 (2nd Cir. 1983), the Second Circuit Court of Appeals held that an official who has final authority in his decisions, at the time they are made, for practical and legal reasons constitute the municipality's final decision maker. In the case at bar, the Commonwealth Attorney made the final decision on whether or not Mann could legally possess firearms. There was no review of his decision by any other policy maker. When that decision was made, the Commonwealth Attorney became a *de facto* policymaker for Boone County.

In *Williams v. City of Little Rock*, 746 F.2d 431 (8th Cir. 1984), the municipality had given its judges the power to make their own personnel decisions. When a judge unlawfully fired an employee, the City defended on the basis that the unlawful decision was

not as a result of an official city policy, but was rather the decision of the individual judge. The Eighth Circuit rejected that argument and stated:

> The facts in this case establish unequivocally that, even though the City theoretically retained the primary responsibility for employment decisions, the City had adopted a policy of delegating authority to the municipal judges to make certain final personnel decisions for the City. The City cannot be allowed now to escape responsibility for the consequences of an act taken pursuant to an established City policy.

Id. at 439.

That is exactly the case here. Sheriff Helmig delegated his policy making authority to the Commonwealth Attorney. The Commonwealth Attorney made an incorrect decision that resulted in a constitutional injury to Mann. Boone County cannot now be allowed to escape responsibility for the consequences of this decision. Review is necessary so that this Court may remedy the Sixth Circuit's error and bring certainly to the issue of when a person may

become a policymaker for purposes of liability pursuant to 42 U.S.C. § 1983.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully Submitted,

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APPENDIX

SIXTH CIRCUIT COURT APPEALS FILINGS:

Opinion,
filed 07/16/08 ..... A1 - A17

EASTERN DISTRICT OF KENTUCKY FILINGS:

Memorandum Opinion and Order,
filed 3/30/07 ..... B1 - B9

Judgment,
filed 03/30/07 ..... C1 - C1

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 08a0423n.06
Filed: July 16, 2008

No. 07-5549

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STEPHEN MANN,
Plaintiff-Appellant,

v.

MICHAEL HELMIG, in his capacity as Sheriff of Boone County.
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Before: MARTIN, GIBBONS, and GRIFFIN, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. Plaintiff-appellant Stephen Mann appeals the district court's grant of summary judgment to defendant-appellee Michael Helmig, Sheriff of Boone County. Mann argues that the district court erred in

granting Helmig's motion for summary judgment on Mann's § 1983 claims and denying Mann's motion for summary judgment. For the following reasons, we affirm the district court's decision.

I.

The district court recounted the undisputed facts underlying Mann's § 1983 claim as follows:

> Plaintiff Stephen Mann ("Mann") is a resident of Burlington, Kentucky. On or about December 1, 1999, the Kenton County District Court entered a Domestic Violence Order ("DVO") against Mann based on a petition filed by Mann's sister, Gladys Wagner. (Exh. 1, Def. MSJ) Among other things, the DVO restrained Mann from purchasing, owning, or possessing firearms. (Exh. 2, Def. MSJ)
>
> At Wagner's request, the Kenton County District Court extended the DVO several times. In 2002, Mann petitioned the court to amend the DVO to lift the firearm restrictions on the grounds that he and Wagner were not "intimate partners" within the meaning of 18 U.S.C. § 922(g).
>
> On November 6, 2002, the Kenton County court issued an opinion stating

that it "may," depending on the relationship of the parties, be a violation of 18 U.S.C. § 922(g) for Mann to possess firearms while subject to a DVO. (Exh. 4, Def. MSJ) The court further stated that it would "issue a new order of protection incorporating the appropriate statement of the law into its order and extending the order for one additional year." (Id.) The court then entered an Amended DVO which stated: "Pursuant to 18 U.S.C. § 922 (g)(8), it ***may*** be a federal violation to purchase, receive or possess a firearm or ammunition while subject to this order." (Exh. 5, Def. MSJ) (emphasis added)

On December 1, 2003, the Amended DVO bearing the same language was extended through December 1, 2005. (Exh. 6, Def. MSJ)

On May 16, 2005, while the Amended DVO was still in effect, the Boone County Sheriff's Department received a call reporting gunshots at [Mann's] residence. Deputy Chris Combs responded to the call.

Deputy Combs arrived at [Mann's] house and approached the front door. [Mann] opened the door and let Combs

into the house. Combs told [Mann] he had received a "shots fired" call and asked if [Mann] was the source of the shots. [Mann] stated that he had been shooting at a target in his backyard. [Mann] then led Combs through the kitchen, out the back door and onto the porch, where he showed Combs three rifles sitting on his picnic table. Combs thanked [Mann] for his cooperation and left.

When he returned to his car, Deputy Combs received a message that the person who had made the "shots fired" call wanted to talk with him. That person was Mark Mann, [Mann's] brother, who lived next door. Deputy Combs drove next door, where he was approached by Mark Mann's wife and another woman. After Deputy Combs explained that it was not illegal for [Mann] to fire his guns in his own back yard in that part of the county, the women told Combs that [Mann] was subject to a DVO.

Deputy Combs returned to [Mann's] property to discuss the DVO with him. By then, [Mann] had returned to the back yard and resumed firing his guns. Deputy Combs told [Mann] to unload and put his weapon down, which

[Mann] did. Deputy Combs asked [Mann] if there was a DVO against him, and [Mann] said yes. [Mann] and Deputy Combs went into the house where [Mann] showed Combs a copy of the amended DVO entered on December 1, 2003. [Mann] stated that it did not prevent him from possessing firearms because he was not an "intimate partner" of the person who took out the DVO. Reviewing the language of the amended DVO, however, Deputy Combs was unsure whether it restricted [Mann] from having guns.

[Mann] then gave Deputy Combs the phone number of his attorney who had represented him in connection with the DVO. Combs tried to reach that attorney but could not. Combs then tried to reach an attorney at the Boone County Attorney's Office but could not do so. Combs then called the Commonwealth Attorney's Office in Boone County and spoke to an attorney in that office regarding the situation. The attorney told Combs that [Mann] was not permitted to possess firearms if he was subject to an active DVO.

Deputy Combs then told [Mann] that he was going to take all his firearms and asked where they were located. Combs

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>
> Sometime thereafter, the Boone County Sheriff's office informed [Mann] that he could come retrieve his guns, but [Mann] apparently has not done so.

Mann v. Helmig, 2007 U.S. Dist. LEXIS 23839, at *4-5 (E.D. Ky. March 30, 2007).

On August 2, 2005, Mann filed suit against Boone County Sheriff Helmig in his official capacity pursuant to 42 U.S.C. § 1983.[1] In his complaint, Mann alleged that Boone County had violated his Second, Fourth, Fifth, and Fourteenth Amendment rights; in addition, Mann advanced a claim of conversion under Kentucky law. Both parties subsequently filed motions for summary judgment.

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[1]As he makes clear in his reply brief, Mann's "complaint did not name Sheriff Helmig in his individual capacity, but only in his official capacity. As such, his cause of action is against Boone County."

The district court granted Helmig's motion for summary judgment and denied Mann's motion for summary judgment, concluding that "plaintiff has not shown, as a matter of law, that this single, isolated incident was part of any pattern of unconstitutional conduct by Boone County, or that it was otherwise taken pursuant to any County policy or custom." *Mann*, 2007 U.S. Dist. LEXIS 23839, at *8. In turn, the district court dismissed Mann's claim of conversion, declining to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367(c).

II.

We review *de novo* the grant of summary judgment by a district court. *Miller v. Am. Heavy Lift Shipping*, 231 F.3d 242, 246 (6th Cir. 2000). Summary judgment may be granted only if there are no genuine issues of material fact and one party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). A dispute over a material fact cannot be "genuine" unless a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 248 (1986). In reviewing a district court's decision to grant summary judgment, we view all the facts and the inferences drawn therefrom in the light most favorable to the

nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III.

As Mann states unequivocally in his reply brief, his cause of action pursuant to § 1983 is against Sheriff Helmig in his official capacity. As a result, Mann's cause of action is a suit against Boone County. *Moore v. City of Harriman*, 272 F.3d 769, 776 (6th Cir. 2001) (*en banc*) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather a suit against the official's office ... as such, it is no different from a suit against the State itself.") (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989)).

Pursuant to a § 1983 suit, "A municipal liability claim '... must be examined by applying a two-pronged inquiry: (1) Whether the plaintiff has asserted the deprivation of a constitutional right at all; and (2) Whether the [municipality] is responsible for that violation." *Doe v. Claiborne County*, 103 F.3d 495, 505-06 (6th Cir. 1996). In satisfying the second prong of this inquiry, "A plaintiff who sues a municipality for a constitutional violation under § 1983 must prove that the municipality's policy or custom caused the alleged injury." *Ellis v. Cleveland*

Mun. Sch. Dist., 455 F.3d 690, 700 (6th Cir. 2006) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978)).

In order to prove the existence of a municipality's policy or custom, plaintiffs "can look to (1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal rights violations." *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005). In his appeal, Mann pursues the second option, arguing that Deputy Combs confiscated Mann's firearms and ammunition pursuant to a policy of the Boone County Sheriff s department.

However,

> not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official - even a policymaking official - has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.

Pembaur v. City of Cincinnati, 475 U.S. 469, 481-82 (1986). Thus, Mann must demonstrate that Deputy Combs acted pursuant to a policy established by an individual who possessed final decision-making authority and that this policy caused the alleged injuries. As the district court correctly noted, Mann cannot satisfy this requirement.

1.

The Supreme Court has defined the term "policy" as a "word [that] generally implies a course of action consciously chosen from among various alternatives." *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). At different stages of this litigation, Mann has vacillated between two different arguments as to what policy was the cause of his alleged constitutional damages.

In his brief before this court, Mann describes what he contends to be the policy that caused his alleged injury: "it was the policy or custom of the Boone County Sheriffs Office to follow the advice of the County or Commonwealth Attorney when a deputy was unsure how deal [sic] with a certain situation." (Appellant's Br. 18-19.) Mann repeats this characterization of the policy or custom of which he complains on a number of other occasions: "Boone County's Custom was to follow advice of

Commonwealth Attorney" (Appellant's Br. 17); "Following the advice of the Commonwealth Attorney was Boone County's plan of action" (Appellant's Br. 19); "[I]t was the custom of the Boone County Sheriff to always follow the direction of the Commonwealth Attorney" (Appellant's Br. 10); "The decision to confiscate Mann's firearms was made by Deputy Combs, who had sought and followed the advice of a Commonwealth Attorney ... a procedure that is customary practice for the Boone County Sheriffs Office." (JA 139). This argument thus identifies the policy of consulting an attorney as the cause of Mann's alleged damages.

At oral argument, however, Mann appeared to contend that he was in fact contesting a different policy -- the Commonwealth Attorney's actual advice to Deputy Combs to seize Mann's firearms and ammunition; and it was this "policy" that caused Mann's constitutional damages. This second characterization of the policy also appears at least once in Mann's brief before this court: "In the case at bar ... the policy decision at issue was in fact unconstitutional. It should go without saying that the unlawful confiscation of a citizen's firearms from his or her own home violates the constitution." (Appellant's Br. 20). However, regardless of which

characterization Mann intends to pursue in his appeal, his claims lack merit.

2.

Mann's first characterization of the Boone County policy -- consulting an attorney and following his advice when unsure how to proceed -- fails because he can neither satisfy the causation element of a § 1983 action, nor provide sufficient evidence of the existence of a facially constitutional policy.

In *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), the Supreme Court explained how the causation element of a § 1983 claim functions when the policy in question was not itself unconstitutional:

> [S]ome limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in Monell will become a dead letter. Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official; for example, [the police officer] would never have killed [the defendant's husband] if Oklahoma City did not have a "policy" of

> establishing a police force. But Monell must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy." At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged.

Id. at 823; *see also City of Springfield v. Kibbe*, 480 U.S. 257, 267-268 (1987) ("In some sense, of course, almost any injury inflicted by a municipal agent or employee ultimately can be traced to some municipal policy. Finding § 1983's causation requirement satisfied by such a remote connection, however, would eviscerate Monell's distinction, based on the language and history of § 1983, between vicarious liability and liability predicated on the municipality's own constitutional violations." (emphasis in original)). Thus "[p]roof merely that such a policy or custom was 'likely' to cause a particular violation is not sufficient; there must be proven at least an 'affirmative link' between policy or custom and violation; in tort principle terms, the causal connection must be 'proximate,' not merely 'but-for' causation-in-fact." *Spell v. McDaniel*, 824 F.2d 1380,

1388 (4th Cir. 1987); *see also Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3rd Cir. 1996) ("A plaintiff must also establish that the government policy or custom was the proximate cause of the injuries sustained."); *King v. Massarweh*, 782 F.2d 825, 828 (9th Cir. 1986) (noting that the inquiry under § 1983 is whether the actions in question "proximately caused" the alleged damages); *Francis v. Barlow*, 2006 U.S. Dist. LEXIS 30394, at * 11 (W.D. Ky. May 16, 2006) ("A § 1983 complaint must allege that specific conduct by the defendant was the proximate cause of the constitutional injury.").

While Mann is somewhat unclear on his theory of causation, it would seem that his claim requires the following argument: the policy of "follow[ing] the advice of the County or Commonwealth Attorney when a deputy was unsure how deal [sic] with a certain situation" was the proximate cause of Mann's alleged injuries. This theory of causation seems to be of the precise type the Supreme Court sought to foreclose in *Tuttle*. Indeed, one can always "retreat [] far enough" to find a policy that "caused" the alleged constitutional violation. *See Tuttle*, 471 U. S. at 823. But the proximate cause of Mann's alleged constitutional injuries was either the ambiguity of his DVO, the erroneous advice of the Commonwealth

Attorney, or, less directly, the inability of Deputy Combs to contact Mann's attorney. There simply is too tenuous a connection between the policy of contacting and following the advice of the county or Commonwealth Attorney and the injuries sustained by Mann. Thus, it cannot be said that there is an affirmative link between the "policy" and the confiscation of Mann's firearms and ammunition. In turn, Mann has not satisfied the causation element of his § 1983 claim, a conclusion that justifies the district court's grant of Helmig's motion for summary judgment.

Moreover, Mann provides proof of only one incident as the basis for his claim that there exists a county policy that caused his alleged damages. Mann does correctly note that in some cases, proof of a single incident where a municipal official caused constitutional injuries is sufficient to demonstrate the existence of an unconstitutional policy or custom: "The Supreme Court has stated that, under appropriate circumstances, liability may be imposed upon a municipality for a single decision by a policymaker." *Monistere v. City of Memphis*, 115 F. App'x 845, 851 (6th Cir. 2004) (citing *Pembaur*, 475 U.S. at 480). However, given the policy of which Mann complains, this is not the case: "where the

policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Tuttle*, 471 U.S. at 824; *accord Bills v. Aseltine*, 958 F.2d 697,708 (6th Cir. 1992).

In the instant case, the policy of consulting with the Commonwealth Attorney is clearly not itself unconstitutional. Thus to survive summary judgment, Mann cannot simply rely on one incident to satisfy his burden.

For these reasons, Mann's claims, based upon his first characterization of the Boone County policy, fail.

3.

The second characterization of Mann's argument, offered at oral argument and at one point in his brief (Appellant's Br. 20), is that the attorney's decision to tell Deputy Combs to confiscate Mann's weapons was the policy causing his constitutional injuries.

The obvious difficulty with this argument is that Mann did not sue the Commonwealth Attorney or his agents, and thus their decisions cannot be

challenged here. Certainly, there is no basis in this record for concluding that the Commonwealth Attorney creates policy for Boone County, the only defendant in this case. This iteration of Mann's argument fares no better than his first version.

IV.

For the foregoing reasons, we affirm the district court's grant of summary judgment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 05-153 (WOB)

STEPHEN MANN
Plaintiff

VS.

MICHAEL HELMIG
Defendant

MEMORANDUM OPINION AND ORDER

This is a civil rights action brought pursuant to 42 D.S.C. § 1983 arising out of the confiscation of plaintiff's firearms. Plaintiff alleges violations of his federal constitutional rights under the Second, Fourth, Fifth, and Fourteenth Amendments, as well as a state law claim for conversion. The case is before the court on the parties' cross motions for summary judgment. (Doc. ## 28, 38)

The court heard oral argument on these motions on Thursday, March 29, 2007. Bryan Perkins represented the plaintiff, and Jeff Mando represented

the defendant. Also present was plaintiff Stephen Mann. Official court reporter Joan Averdick recorded the proceedings.

Factual and Procedural Background

Plaintiff Stephen Mann ("Mann") is a resident of Burlington, Kentucky. On or about December 1, 1999, the Kenton County District Court entered a Domestic Violence Order ("DVO") against Mann based on a petition filed by Mann's sister, Gladys Wagner. (Exh. 1, Def. MSJ) Among other things, the DVO restrained Mann from purchasing, owning, or possessing firearms. (Exh. 2, Def. MSJ)

At Wagner's request, the Kenton County District Court extended the DVO several times. In 2002, Mann petitioned the court to amend the DVO to lift the firearm restrictions on the grounds that he and Wagner were not "intimate partners" within the meaning of 18 U.S.C. § 922(g).

On November 6, 2002, the Kenton County court issued an opinion stating that it "may," depending on the relationship of the parties, be a violation of 18 D.S.C. § 922(g) for Mann to possess firearms while subject to a DVO. (Exh. 4, Def. MSJ) The court further stated that it would "issue a new order of protection incorporating the appropriate statement of the law into its order and extending the

order for one additional year." (Id.) The court then entered an Amended DVO which stated: "Pursuant to 18 D. S. C. § 922 (g) (8), it may be a federal violation to purchase, receive or possess a firearm or ammunition while subject to this order." (Exh. 5, Def. MSJ) (emphasis added)

On December 1, 2003, the Amended DVO bearing the same language was extended through December 1, 2005. (Exh. 6, Def. MSJ)

On May 16, 2005, while the Amended DVO was still in effect, the Boone County Sheriff's Department received a call reporting gunshots at plaintiff's residence. Deputy Chris Combs responded to the call.

Deputy Combs arrived at plaintiff's house and approached the front door. Plaintiff opened the door and let Combs into the house. Combs told plaintiff he had received a "shots fired" call and asked if plaintiff was the source of the shots. Plaintiff stated that he had been shooting at a target in his backyard. Plaintiff then led Combs through the kitchen, out the back door and onto the porch, where he showed Combs three rifles sitting on his picnic table. Combs thanked plaintiff for his cooperation and left.

When he returned to his car, Deputy Combs received a message that the person who had made

the "shots fired" call wanted to talk with him. That person was Mark Mann, plaintiff's brother, who lived next door. Deputy Combs drove next door, where he was approached by Mark Mann's wife and another woman. After Deputy Combs explained that it was not illegal for plaintiff to fire his guns in his own back yard in that part of the county, the women told Combs that plaintiff was subject to a DVO.

Deputy Combs returned to plaintiff's property to discuss the DVO with him. By then, plaintiff had returned to the back yard and resumed firing his guns. Deputy Combs told plaintiff to unload and put his weapon down, which plaintiff did. Deputy Combs asked plaintiff if there was a DVO against him, and plaintiff said yes. Plaintiff and Deputy Combs went into the house where plaintiff showed Combs a copy of the amended DVO entered on December 1, 2003. Plaintiff stated that it did not prevent him from possessing firearms because he was not an "intimate partner" of the person who took out the DVO.[1]

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[1]In the view of this court, plaintiff was correct. *See* 18 D.S.C. §§ 922 (g) (8), 921 (a) (32). Only a person who has been restrained by a court order from harassing, stalking or threatening an "intimate partner" is prohibited by this subsection from possessing firearms. An "intimate partner" is defined, so far as

Reviewing the language of the amended DVO, however, Deputy Combs was unsure whether it restricted plaintiff from having guns.

Plaintiff then gave Deputy Combs the phone number of his attorney who had represented him in connection with the DVO. Combs tried to reach that attorney but could not. Combs then tried to reach an attorney at the Boone County Attorney's Office but could not do so. Combs then called the Commonwealth Attorney's Office in Boone County and spoke to an attorney in that office regarding the situation. The attorney told Combs that plaintiff was not permitted to possess firearms if he was subject to an active DVO.

Deputy Combs then told plaintiff that he was going to take all his firearms and asked where they were located. Combs and another deputy who had arrived retrieved a total of six guns and a box of ammunition. After giving plaintiff a receipt for the weapons, the deputies left and took the items to the

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pertinent here, as "one who cohabitates or has cohabited with the person." "Cohabitates" implies a sexual relationship. *See Webster's II New College Dictionary* 218 (2001). Everyone agrees no such relationship existed here.

Boone County Sheriff's Department where the weapons were logged into the property room.

Sometime thereafter, the Boone County Sheriff's office informed plaintiff that he could come retrieve his guns, but plaintiff apparently has not done so.

Plaintiff filed this action against Boone County Sheriff Helmig in his official capacity only on August 2, 2005. He alleges a violation of 42 U.S.C. § 1983 as well as a claim for conversion under Kentucky law. Both parties have filed motions for summary judgment, which are ripe for resolution.

Analysis

As stated above, this court agrees with plaintiff that he was wrongfully deprived of his property. Even if this would amount to a constitutional violation, however (which the court does not decide), there is no liability on the part of the Sheriff or County under 42 D.S.C. § 1983.

To succeed on his claim against Boone County Sheriff Michael Helmig in his official capacity, plaintiff must prove that his alleged constitutional injury resulted from a "policy" or "custom" attributable to the County. *Monell v. Dep't of Social Serv.*, 436 D.S. 658, 694 (1978). "The acts in question must be 'acts which the municipality has officially

sanctioned or ordered.'" *Holloway v. Brush*, 220 F.3d 767, 773 (6th Cir. 2000) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986)). Acts will only be construed as official policy when they are those of a body or an official "responsible for establishing final government policy respecting such activity." *Pembaur*, 475 U.S. at 483.

Plaintiff cannot show that his guns were unlawfully seized pursuant to an official custom or policy of Boone County. His argument that Deputy Combs's reliance on the legal advice of the assistant attorney in the Commonwealth Attorney's office is misplaced, for such a person is not a "final decision maker" on behalf of the County. *See Holloway*, 220 F.3d at 773 (holding that action of Clermont County Assistant Prosecutor did not establish "custom or policy" of county); *Pusey v. City of Youngstown*, 11 F.3d 652, 659 (6th Cir. 1993) (city prosecutor did not possess final authority to establish municipal policy).[2]

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[2]Plaintiff's reliance on *Pembaur* is also misplaced, as the chief County Prosecutor there had been delegated authority, pursuant to an Ohio statute, to direct the actions of the county police officers. *Pembaur*, 475 u.S. at 484-85. The Supreme Court thus concluded that the County Prosecutor's directive that the police officers enter plaintiff's office went beyond mere

Second, plaintiff's argument that Sheriff Helmig "ratified" Deputy Combs's acts fails as a matter of law, for the evidence is undisputed that Sheriff Combs was unaware of the seizure until served with this lawsuit. By that time, plaintiff had been notified that he could come retrieve his firearms.

In sum, plaintiff has not shown, as a matter of law, that this single, isolated incident was part of any pattern of unconstitutional conduct by Boone County, or that it was otherwise taken pursuant to any County policy or custom. Defendant is thus entitled to summary judgment on plaintiff's federal claims.

Finally, plaintiff has also alleged a claim for conversion. However, this claim presents solely a question of state law, and given that the court is dismissing plaintiff's federal claims, the court will decline to exercise its supplemental jurisdiction over it, pursuant to 28 D.S.C. § 1367(c).

Therefore, having heard the parties, and the court being otherwise sufficiently advised,

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"legal advice" and in fact constituted the final word on county policy in that situation. *Id.* Also, the directive was given by the Prosecutor himself. Here, only an assistant was involved, and he only gave advice.

IT IS ORDERED that (1) defendant's motion for summary judgment (Doc. #38) be, and is hereby, **GRANTED**. Plaintiff's federal claims are **DISMISSED WITH PREJUDICE**, and plaintiff's state law claim is **DISMISSED WITHOUT PREJUDICE**; and (2) plaintiff's motion for summary judgment (Doc. #28) be, and is hereby, **DENIED**. A separate judgment shall enter concurrently herewith.

This 30th day of March, 2007.

Signed By:
William O. Bertelsman /s/ W.O.B
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 05-153 (WOB)

STEPHEN MANN
Plaintiff

VS. **JUDGMENT**

MICHAEL HELMIG
Defendant

Pursuant to the memorandum opinion and order entered concurrently herewith,

IT IS ORDERED AND ADJUDGED that the complaint herein is hereby **DISMISSED**. The federal claims are **DISMISSED WITH PREJUDICE**, and the state claim is **DISMISSED WITHOUT PREJUDICE**. Defendant shall recover his costs.

This 30th day of March, 2007.

Signed By:
William O. Bertelsman **/s/ W.O.B**
United States District Judge

No. 08-486

Supreme Court, U.S.
FILED
NOV 14 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

STEPHEN A. MANN,

Petitioner,

v.

MICHAEL HELMIG, Sheriff,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the Sixth Circuit correctly affirm the District Court's grant of summary judgment in Respondent's favor on Petitioner's federal claims?

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COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case omits material facts that facilitate an understanding of the case. Following is a more thorough statement of the facts:

Petitioner, Stephen Mann, is a disabled veteran who suffers from post-traumatic stress disorder as a result of his military service in Vietnam. (R.33 S. Mann at TR 10-12, Apx. pp. 342-344) He lives on Idlewild Drive in unincorporated Boone County, Kentucky. (R.33 S. Mann at TR 6, Apx. p. 338)

In 1999, Petitioner had an altercation with his sister, Gladys Wagner, in which Petitioner told Wagner that she "and her bastard kids would never be allowed at my house again." (R.33 S. Mann at TR 35, Apx. p. 367) According to Petitioner, Wagner then falsely reported to an unidentified police agency in Kenton County that Petitioner had threatened to kill her and her children. (R.33 S. Mann at TR 35, Apx. p. 367) Based on that report, Wagner petitioned the Kenton District Court for a domestic violence order ("DVO") against Petitioner. (R.38 Helmig's MSJ at Exh. 1, Apx. p. 110-111) The Kenton District Court granted Wagner's petition, entering a DVO against Petitioner on December 1, 1999. The DVO indicated that "[Petitioner] is required to surrender [his] Kentucky license to carry concealed firearms or other deadly weapons to the court" and that "pursuant to 18 U.S.C. § 922(g), it is a federal violation to purchase, receive or possess a firearm while subject to this order." The DVO was scheduled to expire by its

terms on December 1, 2000. (R.38 Helmig's MSJ at Exh. 2, Apx. pp. 112-114)

In October 2000, at Wagner's request, the Kenton District Court extended the DVO through December 1, 2002. (R.38 Helmig's MSJ at Exh. 3, Apx. pp. 115-117)

In 2002, Wagner again petitioned the Kenton District Court to extend the DVO. At the same time, Petitioner moved that Court to lift the DVO's prohibition on firearms, apparently arguing that he and Wagner are not "intimate partners" within the meaning of 18 U.S.C. § 922(g). Having considered both requests, and having reviewed applicable federal statutes, the Kenton District Court issued an Opinion that it "may", depending on the relationship of the parties, be a violation of 18 U.S.C. § 922(g) to possess a firearm while subject to a DVO. In its Opinion, the Kenton District Court indicated that it "will issue a new order of protection incorporating the appropriate statement of the law." (R.38 Helmig's MSJ at Exh. 4, Apx. pp. 118-119) On the same date, the Kenton District Court entered an amended DVO that provided, "Pursuant to 18 U.S.C. Section 922(g)(8), it *may* be a federal violation to purchase, receive or possess a firearm or ammunition while subject to this Order." The amended DVO was to expire by its terms

on December 1, 2003.[1] (R.38 Helmig's MSJ at Exh. 5, Apx. pp. 120-122)

In November 2003, Wagner again petitioned for an extension of the DVO, and the Kenton District Court extended it through December 1, 2005 "subject to amendment on the court's own order." Again, the DVO indicated that, "Pursuant to 18 U.S.C Section 922(g)(8), it *may* be a federal violation to purchase, receive or possess a firearm or ammunition while subject to this Order." (R.38 Helmig's MSJ at Exh. 6, Apx. pp. 123-126)

On May 16, 2005, while the DVO was still in effect, the Boone County Sheriff's Department received a "shots fired" call and was informed that someone was shooting a firearm at Petitioner's house. (R.38 Helmig's MSJ at Exh. 7, Apx. pp. 127-129; R.32 C. Combs at TR 5, Apx. p. 233) A dispatcher sent Boone County Deputy Chris Combs to respond to the call. (R.32 C. Combs at TR 5, Apx. p. 233)

Deputy Combs pulled into Petitioner's driveway, got out of his cruiser and approached the front door of Petitioner's house. (R.33 S. Mann at TR 46, Apx.

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[1] According to allegations in a parallel action that Mann filed against a number of defendants (including Helmig), the Clerk for the Kenton District Court did not properly enter the terms of the amended DVO into the state-wide law enforcement database, such that law enforcement officers like Boone County Deputy Sheriff Chris Combs did not have accurate information about the terms of the amended DVO. *Mann v. Linn et al.*, E.D. Ky., Case No. 06-108.

p. 378) Petitioner opened the door and let Deputy Combs into his house. (R.33 S. Mann at TR 47, Apx. p. 379) Deputy Combs told Petitioner he had received a shots-fired call and asked if Petitioner had been the source of the gunfire. (R.33 S. Mann at TR 47, Apx. p. 379) Petitioner confirmed he had been "shooting a couple rounds" at a target in his backyard. (R.33 S. Mann at TR 48, Apx. p. 380) Petitioner then led Deputy Combs through his kitchen, out his back door and onto his porch, and showed him three rifles sitting on his picnic table. (R.33 S. Mann at TR 44, 48-49, Apx. pp. 380-381) Deputy Combs thanked Petitioner for his cooperation and left. (R.33 S. Mann at TR 51, Apx. p. 383)

When he returned to his cruiser, Deputy Combs had a message on his cruiser's mobile computer that the person who had made the shots-fired call wanted to talk with him. (R.32 C. Combs at TR 9, Apx. p. 237) Deputy Combs pulled his cruiser out of Petitioner's driveway and into the driveway of the neighboring property, which was owned by Petitioner's brother, Mark Mann. (R.32 C. Combs at TR 9, Apx. p. 237) Upon exiting his cruiser, Deputy Combs was approached by Mark Mann's wife and another woman. (R.32 C. Combs at TR 10, Apx. p. 238) After Deputy Combs explained that it was not illegal for Petitioner to discharge his guns in his own back yard in that part of the county, the women told Deputy Combs that Petitioner was subject to a DVO. (R.32 C. Combs at TR 10-11, Apx. p. 238-239)

Deputy Combs returned to Petitioner's property to discuss the DVO with him. (R.32 C. Combs at TR 12, Apx. p. 240; R.33 S. Mann at TR 52, Apx. p. 384) By then, Petitioner had returned to his back yard and resumed firing his rifles. (R.33 S. Mann at TR 51, Apx. p. 383) According to Petitioner, Deputy Combs walked through the side yard of Petitioner's property, assuming a "modified crouched police stance with his hand on his weapon . . . demanding I drop my gun." (R.33 S. Mann at TR 52-53, Apx. pp. 384-385) Petitioner unloaded his weapon and placed it on the picnic table. (R.33 S. Mann at TR 57, Apx. p. 389) Deputy Combs then asked Petitioner if there was a DVO against him. (R.33 S. Mann at TR 57, Apx. p. 389) Petitioner acknowledged there was, and led Deputy Combs into his house to show him a copy of the DVO that was entered on December 1, 2003. (R.33 S. Mann at TR 57-58, Apx. pp. 389-390; R.38 Helmig's MSJ at Exh. 6, Apx. pp. 123-126) Petitioner claimed that the DVO did not preclude him from possessing guns. (R.33 S. Mann at TR 57-58, Apx. pp. 389-390)

Deputy Combs reviewed the DVO that Petitioner showed him, noting the language that said it "*may* be a federal violation to . . . possess a firearm or ammunition while subject to this order." Given such language, Deputy Combs was uncertain whether or not the DVO precluded Petitioner from possessing weapons. (R.32 C. Combs at TR 19-20, 23, Apx. pp. 247-248, 251) Petitioner provided Deputy Combs with the name and phone number of an attorney who had

represented Petitioner in connection with the DVO, and, with Petitioner's permission, Deputy Combs tried to no avail to reach the attorney for an explanation of the facts and circumstances that led to the entry of the DVO. (R.32 C. Combs at TR 17, 26, Apx. pp. 245, 254; R.33 S. Mann at TR 61, Apx. p. 393) Deputy Combs then tried to reach the Boone County Attorney's Office for direction, but was unable to reach anyone in that office. (R.32 C. Combs at TR 26, Apx. p. 254) Finally, Combs called the Commonwealth Attorney's Office and spoke with Assistant Commonwealth Attorney Jason Hiltz. (R.32 C. Combs at TR 26, Apx. p. 254) Hiltz advised Deputy Combs that Petitioner was not permitted to possess firearms *if* he was subject to an active DVO, but gave no further instruction. (R.32 C. Combs at TR 27, Apx. p. 255)

Deputy Combs then decided to transport Petitioner's firearms to the Boone County Sheriff's Department for "safekeeping" until the relevant facts regarding the DVO could be ascertained. (R.38 Helmig's MSJ at Exh. 8, Apx. pp. 130-131) He secured the three rifles that Petitioner had been firing. Petitioner also volunteered that he had three other firearms in the house, and told Deputy Combs where to find those. (R.33 S. Mann at TR 66-67, Apx. pp. 398-399) Deputy Combs located and secured those three firearms and a box of ammunition, gave Petitioner a receipt for all six weapons, and entered the weapons in the property room of the Boone County Sheriff's Department for safekeeping. (R.38 Helmig's MSJ at Exh. 8 and 9, Apx. pp. 130-132)

On multiple occasions since that time, both before and after this action was filed, Petitioner was made aware that the firearms could be retrieved from the Property Room at the Boone County Sheriff's Department, but Petitioner refused to retrieve them. Rather, Petitioner insisted that Boone County Sheriff Michael Helmig personally deliver the firearms to his home. In fact, Petitioner testified that he filed this action simply because Helmig – who was not even aware that Petitioner's firearms had been transported to the Sheriff's Department for safekeeping until *after* this action was filed – did not do so. (R.33 S. Mann at TR 79, 83-84, 86-87, Apx. pp. 411, 415-416, 418-419; R.29 M. Helmig at TR 11-12, Apx. pp. 290-291; R.38 Helmig's MSJ at Exh. 9, Apx. p. 132)

PROCEEDINGS BELOW

Petitioner filed this action against Boone County Sheriff Helmig – in his official capacity only – on August 2, 2005. Pursuant to 42 U.S.C. § 1983, Petitioner sought to recover for the alleged violations of his federal constitutional rights under the Second, Fourth, Fifth and Fourteenth Amendments. (R.1 Complaint, Apx. pp. 9-13) He also asserted a state-law cause of action for conversion. (R.1 Complaint, Apx. pp. 9-13) Following an ample period of discovery, the parties filed cross-motions for summary judgment.

At approximately the same time, Petitioner moved the District Court for leave to amend his Complaint for the purpose of naming additional defendants. (R.25 Motion for Leave, Apx. pp. 19-25) Specifically, Petitioner sought for the first time to assert claims against Deputy Combs; Boone County Sheriff's Deputy Robert Duncan, who responded to the shots-fired complaint and was present for a portion of the interaction between Petitioner and Deputy Combs; and Assistant Commonwealth Attorney Jason Hiltz, whom Deputy Combs had called for legal advice during the encounter. (R.25 Motion for Leave, Apx. pp. 19-25) Noting the passage of the deadline for adding parties, the passage of the twice-extended discovery period, and the likelihood that claims asserted against the proposed defendants would be precluded by the statute of limitations, the District Court denied Petitioner's Motion to Amend his Complaint. (R.37 Order of 11/6/06, Apx. pp. 83-85)

Having resolved that issue, the District Court granted Sheriff Helmig's Motion for Summary Judgment and denied Petitioner's. (Petition Apx. p. B-9) The District Court observed that Petitioner filed his claims against Boone County Sheriff Helmig in his official capacity only, and that such claims could not succeed absent proof that the alleged constitutional violation was caused by an official governmental policy or custom. (Petition Apx. p. B-6) The District Court ruled that Petitioner's federal claims could not succeed because he had not shown that the alleged violations of his constitutional rights were

undertaken pursuant to a policy or custom of Boone County. (Petition Apx. p. B-7) In so doing, the District Court rejected Petitioner's claim that Assistant Commonwealth Attorney Hiltz's conversation with Deputy Combs constituted official county policy, because Hiltz was not a final policymaker for Boone County. (Petition Apx. p. B-7)

Having granted summary judgment in favor of Sheriff Helmig on Petitioner's federal claims, the District Court declined to exercise supplemental jurisdiction over Petitioner's state-law conversion claim and dismissed that claim without prejudice. (Petition Apx. p. B-8)

On April 26, 2008, Petitioner filed his Notice of Appeal with the Sixth Circuit. In a thorough and well-reasoned opinion, the Sixth Circuit affirmed the District Court's decision granting summary judgment to Sheriff Helmig. (Petition Apx. p. A-17) The Court held that Petitioner had not proved that Boone County maintained a policy that required its deputies to consult with local prosecutors when faced with difficult questions in their law enforcement duties. (Petition Apx. p. A-16) The Court further stated that even if such a policy did exist, Petitioner had not established that the asserted Boone County policy actually caused the alleged deprivation of his constitutional rights. (Petition Apx. p. A-15) Finally, the Court held that Assistant Commonwealth Attorney Hiltz was not acting as a policymaker for Boone

County when he spoke with Deputy Combs. (Petition Apx. p. A-17)

This Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT PRESENT A COMPELLING REASON TO JUSTIFY THE EXERCISE OF CERTIORARI.

The issue Petitioner has identified for review by this Court is hardly novel or unique. Specifically, Petitioner claims the lower courts erred in determining that Assistant Commonwealth Attorney Hiltz was not a policymaker for Boone County. (Petition p. 12-13; Petition Apx. p. A-17, B-7) Petitioner also asks this Court to define when and under what circumstances a person possesses final policymaking authority for the government, an issue Petitioner argues is currently "uncertain." (Petition, p. 29-30) A well-developed body of law, emanating from a long line of this Court's decisions, already governs that issue.

Contrary to Petitioner's suggestion, there is no uncertainty with respect to when and under what circumstances a person possesses final policymaking authority for the government. In fact, this Court has addressed that issue time and again in cases such as *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986); *St. Louis v. Propotnik*, 485 U.S. 112 (1988); *Jett v. Dallas Independent School Dist.*, 491

U.S. 701 (1989); *McMillan v. Monroe County, Alabama*, 520 U.S. 781 (1997). From this precedent and the lower courts' interpretation of it, a clear definition of the municipal policymaker emerges: A policymaker is one who is authorized to decide what a municipality's policy on a specific subject will be, and whose decisions in that regard are neither subject to review nor constrained by preexisting municipal policies. *Pembaur*, 485 U.S. at 481-485; *Propotnik*, 485 U.S. at 124-127. *See also Welch v. Ciampa*, 2008 U.S. App. LEXIS 20485 (1st Cir. Sept. 23, 2008); *Roe v. City of Waterbury*, 542 F.3d 31 (2nd Cir. 2008); *Shehee v. City of Wilmington*, 67 Fed. Appx. 692 (3rd Cir. 2003); *Lytle v. Doyle*, 326 F.3d 463 (4th Cir. 2003); *Bolton v. City of Dallas*, 541 F.3d 545 (5th Cir. 2008); *Monistere v. City of Memphis*, 115 Fed. Appx. 845 (6th Cir. 2004); *Killinger v. Johnson*, 389 F.3d 765 (7th Cir. 2004); *Ware v. Jackson County*, 150 F.3d 873 (8th Cir. 1998); *Lytle v. Carl*, 382 F.3d 978 (9th Cir. 2004); *Dempsey v. City of Baldwin*, 143 Fed. Appx. 976 (10th Cir. 2005); *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005).

Though Petitioner contends there is a conflict among the Circuit Courts regarding the identification of policymakers, the Second and Eighth Circuit cases he cites fail to support his claim. (Petition, p. 29-30)

In the Second Circuit case, a municipal hospital fired its employee for questioning the misuse of the hospital's funds. *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41 (2nd Cir. 1983). The Second Circuit concluded that the municipal hospital could be held

liable for the employee's termination because the official who terminated her was authorized to make final policy with respect to personnel, by virtue of his title and position at the hospital, and that official's decisions were not subject to review by upper management. *Id.* at 45-46.

The Eighth Circuit case is factually similar to *Rookard*. In the Eighth Circuit case, a municipal judge fired one employee and harassed another who had reported the judge's misconduct to law enforcement officials. *Williams v. Butler,* 863 F.2d 1398, 1399 (8th Cir. 1988). In the resulting § 1983 action, the Eighth Circuit ruled that the judge was a final policymaker for the municipality, given that the judge had been allowed to exercise *carte blanche* authority to control and supervise his employees over a course of years, without any intercession on the part of the municipality.

Rookard and *Williams* are fully consistent with each other and with this Court's precedent. In both cases, the Circuit Courts determined whether the officials in their respective cases were policymakers by examining the official's authority to make policy decisions with regard to a specific subject, and whether the official's decisions had been subject to review or constrained by preexisting municipal policies. Such reasoning is consistent with *Pembaur*, *Propotnik*, and other precedents of this Court.

Of course, in deciding the present case, the District Court concluded, and the Sixth Circuit ultimately agreed, that Assistant Commonwealth Attorney Hiltz was *not* a policymaker for Boone County. The fact that the courts reached a different decision in this case does not, however, render the decision inconsistent with *Rookard*, *Williams* or the precedent of this Court, as Petitioner would like this Court to believe. Here, the courts applied the same legal principles that govern the identification of a policymaker, but those principles applied to the very different facts of the case did not require the same conclusion. Unlike the officials in *Rookard* and *Williams*, Assistant Commonwealth Attorney Hiltz is not an employee of the government for which he is claimed to be a policymaker. Rather, Hiltz is an employee of the Commonwealth of Kentucky. As a result, he is not authorized by virtue of his title or position to make policy on behalf of Boone County. Moreover, unlike the facts in *Rookard* or *Williams*, there is no evidence in the present case that the Commonwealth Attorney's Office generally or Hiltz specifically made policy decisions with respect to the day-to-day activities of Boone County Sheriff's Deputies.

In short, there simply is no compelling reason to exercise certiorari in this case. The legal principles for the identification of municipal policymakers are clear, and they are consistently applied by the Circuit Courts of Appeal. Petitioner's contentions to the contrary are nothing more than a cleverly-couched

attempt to seek review of a lower court's application of well-established law to the facts of his case.

II. FURTHER REVIEW OF PETITIONER'S CLAIMS IS UNNECESSARY BECAUSE HILTZ DID NOT ACT AS A POLICY-MAKER WHEN HE PROVIDED ADVICE TO DEPUTY COMBS.

Not only is there no compelling reason to grant certiorari in this case, review of the case would not change the outcome. The District Court correctly concluded, and the Sixth Circuit correctly agreed, that Hiltz was not a policymaker for Boone County.

A. Sheriff Helmig Did Not Delegate Final Policymaking Authority to Assistant Commonwealth Attorney Hiltz.

It is well-established that a governmental official who has the authority to establish official policy in some respect or another may delegate his authority to a second official, who then becomes a "policymaker." *Pembaur*, 475 U.S. at 483. In *Pembaur*, Hamilton County Sheriff's Deputies contacted their supervisor, who was a policymaker for Hamilton County in the arena of law enforcement, to determine whether they could forcibly enter a doctor's office in order to serve capiases on the doctor's employees. *Id.* at 473. The deputies' supervisor told them to call an assistant Hamilton County Prosecutor and to follow the prosecutor's instructions. *Id.* at 472, 484. Consistent with

their supervisor's direction, the deputies called an assistant prosecutor, who directed the deputies to "go in and get" the witnesses. *Id.* at 473. Under those circumstances, this Court ruled that the deputies' supervisor delegated his policymaking authority to the prosecutor when he instructed the deputies to follow the instructions of the prosecutor. *Id.* at 485.

Relying on *Pembaur*, Petitioner asserts that Sheriff Helmig delegated his policymaking authority to Assistant Commonwealth Attorney Hiltz. (Petition p. 22) However, *Pembaur* and the present case are different in a pivotal respect. In *Pembaur*, a government official with policymaking authority – the deputies' supervisor – clearly and specifically delegated his policymaking authority to the prosecutor when he instructed the deputies to call the prosecutor and to follow the prosecutor's orders. *See* 475 U.S. at 473.

In the present case, no such delegation ever occurred. Deputy Combs was never ordered by a supervisor to seek legal advice from Assistant Commonwealth Attorney Hiltz. Rather, Deputy Combs made a unilateral decision to contact the Commonwealth Attorney to seek advice with respect to a situation not otherwise addressed in the Boone County Sheriff's Department's policies and procedures. (R.32 C. Combs at TR 26, Apx. p. 254) Deputy Combs, who has no policymaking authority, cannot effectively delegate policymaking authority to other governmental officials.

The sole basis for Petitioner's contention that Sheriff Helmig delegated policymaking authority to Hiltz is a single, undeveloped statement from Sheriff Helmig's deposition testimony that "in general, when we're seeking legal advice from the County Attorney or the Commonwealth Attorney, we follow that advice." (Petition p. 21) Based on that testimony, Petitioner concludes that Boone County maintains a policy whereby a deputy who is uncertain how to proceed should contact the Commonwealth Attorney and follow whatever advice he receives. (Petition p. 22) Petitioner's conclusion is contrived extrapolation.

Essentially, Sheriff Helmig testified that he expects deputies to follow legal advice when they receive it. This, of course, is not the same as Helmig testifying that he has given deputies *carte blanche* authority to seek legal advice. Contrary to Petitioner's assertions, Helmig's testimony simply cannot be read as establishing that it is standard operating procedure in Boone County for deputies to call the Commonwealth or County Attorney for instruction on the appropriate law enforcement action to take "whenever" they are uncertain. Since delegation depends on proof that Helmig instructed his deputies to seek legal advice from a third party, Helmig's testimony does not support Petitioner's conclusion with respect to Boone County's policy.

Realizing the weakness of his own arguments, Petitioner contends that the Sixth Circuit's conclusion conflicts with its own prior decision in *Monistere v. City of Memphis*, 115 Fed. Appx. 845 (6th Cir.

2004). (Petition p. 23) In *Monistere*, the Memphis police department conducted an internal affairs investigation of two of its police officers after a citizen complained of their conduct during a traffic stop. *Id.* at 848. During the investigation, the officers were subjected to a strip search, allegedly without probable cause. *Id.* The officers filed suit, alleging that their constitutional rights had been violated. *Id.* On the issue of municipal liability, the city argued that it could not be held liable because it maintained no formal policies or procedures permitting an internal affairs investigator to require strip searches of those under investigation. *Id.* at 850. Consequently, the city claimed that the strip search was not undertaken pursuant to official policy. *Id.*

Notwithstanding the absence of a formal policy on that issue, the Sixth Circuit found the city liable because it had historically allowed internal affairs investigators to conduct their investigations without any defined parameters and with complete discretion to make decisions about the procedures to be used and the manner in which the investigations would be conducted. *Id.* at 851. By permitting the investigators such broad latitude in conducting investigations, the city had essentially delegated the authority to establish policy pertaining to investigations, thereby making the investigators final policymakers. *Id.*

The critical difference, however, between *Monistere* and the present case is that in *Monistere* the city had, over a course of years, engaged in a pattern and custom of allowing internal affairs investigators to

make such decisions. *Id.* In contrast, there is no such evidence in this case. Sheriff Helmig's testimony – which essentially indicated that he expects deputies to follow legal advice when they receive it – does not establish that he delegated to Hiltz the general power and authority to give legal advice to Helmig's deputies. There certainly is no evidence that any Boone County deputy has ever previously sought legal advice from Hiltz and no evidence that Sheriff Helmig ever told his deputies on this or any other occasion to seek legal advice from Hiltz. Simply put, the historical evidence that allowed the Sixth Circuit to conclude that the internal affairs investigators in *Monistere* had been delegated policymaking authority does not exist in this case.

Despite Petitioner's contentions, the record does not suggest that Hiltz was delegated authority to make final policy for Boone County – whether by a single order from Sheriff Helmig or by a custom or practice of permitting Hiltz to exercise this authority. Accordingly, the Court is not confronted with a unique factual situation which warrants review as to whether a delegation of policymaking authority occurred.

B. Assuming *Arguendo* that Hiltz Had Policymaking Authority, His Statement to Deputy Combs That "If He Has an Active DVO – Active DVO on Him Right Now, He Is Not to Possess Any Firearms" Was Not the Creation of Official Policy With Respect to the Appropriate Law Enforcement Action.

Even if Assistant Commonwealth Attorney Hiltz had the authority to make final policy on behalf of Boone County, he did not exercise such authority in this case. Petitioner argues that Hiltz established policy when he "advised Deputy Combs, albeit incorrectly, that because of the DVO Mann could not legally possess firearms." (Petition p. 20) This assertion, however, is a mischaracterization of the evidence.

Deputy Combs called Hiltz solely to ask for clarification when he realized the DVO at issue contained the ambiguous statement. Specifically, when Combs saw that the DVO stated that "Pursuant to 18 U.S.C. Section 922(g)(8), it *may* be a federal violation to purchase, receive or possess a firearm or ammunition while subject to this Order," he sought Hiltz's advice as to whether the DVO did or did not preclude Mann from possessing firearms. (R.32 Combs Dep. at TR 19-20, 23, 26-27, Apx. pp. 247-248, 251, 254-255)

In responding to Deputy Combs' inquiry, however, Hiltz did not give Combs any instruction on what action to take given the situation Combs faced.

Rather, Hiltz merely interpreted the DVO, telling Combs "if he has an active DVO – active DVO on him right now, he is not to possess any firearms." (R.32 Combs Dep. at TR 27, Apx. p. 255) Importantly, Hiltz did not "command" Combs to transport the firearms to the Boone County Sheriff's Department, to arrest Petitioner or otherwise order Combs to take any action.

At most, Hiltz acted as a "factfinder" and not a "policymaker" by assessing what he believed was intended by a DVO that had been issued by a court in a different county at the behest of a prosecutor other than himself. Hiltz did not determine the manner in which Deputy Combs should *respond* to the situation. In other words, Hiltz did not choose an appropriate course of action for Combs to follow from among various plausible alternatives. *See Pembaur,* 475 U.S. at 483 (citing *Oklahoma v. Tuttle*, 471 U.S. 808, 823 (1985)). Instead, he assessed the fixed realities of the situation (i.e. the language of the DVO) and drew a conclusion about what he believed that the DVO meant. Such action does not constitute "policymaking."

C. Petitioner's Remaining Allegations Are Insufficient to Hold Boone County Liable Under § 1983.

In his Petition, Petitioner has resurrected unsupported and irrelevant accusations that he last addressed at the District Court level. Specifically,

Petitioner revisits the issue whether Boone County may be held liable for the transportation of his firearms to the Sheriff's Department because Sheriff Helmig allegedly "condoned dishonesty" among his deputies. (Petition, p. 27)

Of course, that theory was and is premised on Petitioner's absurd assertion regarding the license plates on another deputy's personal vehicle. (Petition, p. 27) Petitioner claims that Deputy Brandon Markesberry – who was not involved in the underlying facts in any way – displays license plates on his personal vehicle that read "EXSEAL." Petitioner construes that license plate as a representation by Markesberry that Markesberry was a Navy Seal, and, since Petitioner does not believe that Markesberry ever was a Navy Seal, he concludes that Markesberry is dishonest. Even if Petitioner's assertions are true in every respect[2], the theory that Markesberry's dishonesty can result in Boone County's liability in this case is specious.

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[2] Petitioner's "proof" consists of a television news report that was, according to an unauthenticated transcript attached to a motion Petitioner filed with the District Court (Plaintiff's Motion for Summary Judgment, Exh. C), based on an anonymous source and the unverifiable hearsay statement of a website founder, the website no longer being in operation. The media outlet involved drew no conclusion either way, and in fact obtained records from the National Personnel Records Center – the official repository for military records – verifying that Markesberry had completed Seal training.

Finally, Petitioner contends Sheriff Helmig ratified Deputy Combs' decision to transport Petitioner's firearms to the Sheriff's Department. That contention, which Petitioner last raised with the District Court, is premised on the assertion that Sheriff Helmig did not investigate Petitioner's claim that his firearms had been illegally seized and did not discipline Deputy Combs in connection with the incident. (Petition, p. 26) Of course, municipal liability attaches only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter." *Pembaur*, 475 U.S. at 483-484.

The fact that Sheriff Helmig did not conduct an investigation after hearing that Petitioner believed his firearms had been illegally seized does not support a ratification theory of municipal liability. After this incident occurred, the only issue raised by Petitioner's attorney was whether or not the DVO precluded Petitioner from possessing a firearm. (R.38 Helmig's MSJ Exh. 10) While Petitioner maintained that he was not precluded from possessing a firearm, it was not until this lawsuit was filed that Petitioner asserted the firearms were secured without his consent and, therefore, in violation of his rights. It was also not until this lawsuit was filed that Sheriff Helmig even became aware that the firearms were in his department's possession. (R.29 M. Helmig at TR 11-12) Once aware of the allegation, Helmig questioned Deputy Combs and believed that Deputy Combs had been truthful, had not violated

departmental policy, and had not engaged in inappropriate conduct. (R.29 M. Helmig at TR 30-31, 36-37) Of course, before this action was filed, Boone County Attorneys had already reviewed the issue whether the DVO precluded Plaintiff from possessing the firearms, determined it did not, and advised Plaintiff that he could retrieve his firearms at any time. (R.33 S. Mann at TR 79, 83-84, 86-87) These circumstances hardly connote a "deliberate choice" to approve of allegedly unlawful conduct.

Because review of the lower courts' decisions in this case would not alter the result, Petitioner's Writ of Certiorari must be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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